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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

BREWSTER KAHLE, INTERNET ARCHIVE, RICHARD PRELINGER, AND PRELINGER ASSOCIATES, INC.	**Case No. 04-CV-1127-MMC**
Plaintiffs,	**DEFENDANT'S MEMORANDUM IN OPPOSITION TO "PLAINTIFFS' MOTION TO ALLOW USE OF POWERPOINT SLIDES IN HEARING ON MOTION TO DISMISS"**
v.	
JOHN ASHCROFT, in his official capacity as Attorney General of the United States,	**Date:** **Friday, October 29, 2004** **Time:** **9:00 a.m.** **Courtroom:** **7, 19th Floor** **Judge:** **The Honorable Maxine M. Chesney**
Defendant.	

Pursuant to Civil L.R. 7-10(b)(2), Defendant respectfully presents this Memorandum in Opposition to Plaintiffs' "Motion to Allow Use of Powerpoint Slides in Hearing on Motion to Dismiss" (Pl. Mot.) because the oral argument scheduled for October 29, 2004 on Defendant's Rule 12(b)(6) motion is not an evidentiary hearing; it is an oral argument limited to the legal sufficiency of the claims set forth in Plaintiffs' Amended Complaint.

In their Motion, Plaintiffs seek to present slides to "assist the Court" as part of their opposition to Defendant's Rule 12(b)(6) motion to dismiss at the October 29, 2004 hearing. Pl. Mot. at 1. However, Plaintiffs have not certified that the images on such slides will not introduce facts outside the well-pleaded allegations in the Amended Complaint. In addition, Plaintiffs refused to show their "slides" to Defendant's counsel before filing their motion, despite a request by Defendant's counsel to see them. Plaintiffs have also neglected to attach their proposed slides to their motion, precluding even the Court from reviewing them before oral argument.

It is axiomatic that a Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims stated in the complaint and assumes that the well-pleaded factual allegations are true. For this reason, federal courts uniformly preclude plaintiffs from amending the allegations of a complaint in their opposition to a motion to dismiss pursuant to Rule 12(b)(6). *See*, *e.g.*, *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9^{th} Cir. 1988). In the same vein, unlike at an evidentiary hearing, courts typically will not accept the presentation of facts not alleged in a complaint when hearing argument on a Rule 12(b)(6) motion because such a hearing is limited to a determination of the legal sufficiency of Plaintiffs' claims. Indeed, federal courts routinely exercise their discretion to rule on 12(b)(6) motions without hearing argument.

Thus, Plaintiffs' motion should be denied because Plaintiffs are not permitted to introduce evidence outside the pleadings as part of their opposition to Defendant's Rule 12(b)(6) motion to dismiss. If Plaintiffs wanted the Court to consider their slides when considering Defendant's Rule 12(b)(6) motion, Plaintiffs could have included them as exhibits to their Amended Complaint. Plaintiffs also could have sought leave to amend their complaint to add the slides as exhibits to a further amended complaint any time after Defendant filed the motion to dismiss on June 23, 2004. Instead of presenting their slides in any of these appropriate ways, Plaintiffs ask the Court to deny Defendant the opportunity to object to Plaintiffs' slides until the day of the oral argument. *See* Plaintiffs' "Proposed Order Permitting Plaintiffs' Use of Power Point [sic] Slides at Oct. 29 Hearing," at 1. Plaintiffs should not be permitted to convert an oral argument on a Rule 12(b)(6) motion into an evidentiary hearing as an end-run around the requirement that argument on a Rule 12(b)(6) motion be strictly limited to the legal sufficiency of Plaintiffs' claims set forth in the four corners of the complaint.

Accordingly, Defendant respectfully requests that the Court deny Plaintiffs' motion to present slides at the October 29, 2004 Hearing.

Dated: October 21, 2004.

Respectfully submitted,

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